Supreme Court, U. S.
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No. 79-5269

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

ROBERT EDWARDS, *Petitioner,*

v.

THE STATE OF ARIZONA, *Respondent.*

On Writ Of Certiorari To The Arizona Supreme Court

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

Whether the Fifth, Sixth and Fourteenth Amendments require suppression of a post-arrest confession, which was obtained after Edwards had asked to consult counsel before further interrogation; which resulted from a jail house interrogation that Edwards objected to but was compelled to attend after being held incommunicado; and where the interrogation was instigated by the detectives who timed the questioning to occur just hours before they knew he was to be provided appointed counsel.

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v.

THE STATE OF ARIZONA, *Respondent.*

On Writ Of Certiorari To The Arizona Supreme Court

BRIEF FOR PETITIONER

OPINIONS AND JUDGMENTS IN THE LOWER COURTS

The opinion of the Arizona Supreme Court is reported as *State* v. *Edwards*, 122 Ariz. 206, 594 P.2d 72 (1979).

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3), from a judgment of the Arizona Supreme Court entered on March 27, 1979. A timely Motion for Rehearing was denied by the Arizona Supreme Court on May 2, 1979. On 18 July 1979, Mr. Justice Stevens entered an order under this Court's Docket No. A-48, extending the time for filing the Petition for Writ of Certiorari to and including August 29, 1979. On July 20, 1979, the Pima County, Arizona, Superior Court entered judgment pursuant to the Arizona Supreme Court opinion, setting aside the sentence of death it had previously imposed upon Petitioner, and imposing a sentence of life imprisonment upon him. A timely Petition for Writ of Certiorari was filed on August 28, 1979.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States provides:

Amendment XIV: " . . . nor shall any state deprive any person of life, liberty, or property, without due process of law, . . ."

Amendment V: "No person . . . shall be compelled in any criminal case to be a witness against himself . . ."

AmendmentVI: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

In October 1974, the "La Conga" bar in Tucson, Arizona, was robbed at gunpoint, just as the proprietor and a (bar maid) were closing for the evening. The proprietor, 74 years old, suffered a fatal heart attack during the robbery. Petitioner Robert Edwards was one of four individuals implicated by a felon and heroin user named Cleveland Reed, who was apprehended during 1975 by the Tucson police on other criminal charges and given complete immunity from all prosecution related to the La Conga bar incident. Edwards, a twenty-four year old indigent black, was arrested on January 19, 1976, under authority of a criminal complaint and an arrest warrant charging him with murder, burglary and robbery. Edwards was ultimately convicted of first degree felony murder, as well as burglary and robbery. He was first sentenced to death, but later given life imprisonment.[1] One co-defendant was similarly convicted and sentenced, while another was acquitted of felony murder by a jury, and convicted of the burglary and robbery charges. Cleveland Reed, of course, went completely free.

After Edwards' arrest on January 19, 1976, he was taken to the Tucson Police Station, and read his *Miranda* rights, which he said he understood (J.A. 71).[2] He

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[1] The change in sentence was a result of the Arizona Supreme Court, in *State* v. *Watson*, 120 Ariz. 441, 586 P.2d 1253 (1978), applying the decisions of this Court in *Lockett* v. *Ohio*, 438 U.S. 586 (1978), and *Bell* v. *Ohio*, 438 U.S. 637 (1978), to invalidate certain portions of the Arizona death sentencing statute.

[2] Reference to the Joint Appendix is by "J.A." followed by particular page numbers.

was interrogated over a period of about three hours by Police Detective Sergeant Bunting and two other officers (J.A. 149). The interrogation was for trial preparation purposes, not to "solve" the case or for investigative reasons. Bunting wanted to "obtain a statement to be used in court . . . against him." (J.A. 39-40).

Bunting told Edwards the allegations that Reed and Soto, another accused, had made against him (J.A. 38).[3] Edwards then gave an alibi statement, which was tape recorded and ultimately received in evidence at his trial. He then spoke with the detectives about making a deal, "if it will help him" (J.A. 39). He spoke briefly to a prosecuting attorney by telephone and then said that he would wait to make a deal until he had spoken to an attorney. As Sergeant Bunting testified, Edwards said, "I'm going to wait until I get an attorney to make a deal for me. I'm not going to make a deal now. I'm not going to make a statement now. I'm going to wait until I get my attorney."(J.A. 151.) After he and Edwards went "back and forth" on this subject (J.A. 40), Bunting then terminated his interrogation.

The trial judge concluded that the statements by Edwards on the evening of his arrest constituted a claim of the right to consult counsel before making any statements. On appeal, the Arizona Supreme Court agreed that Edwards had invoked his rights to remain silent and to consult with counsel before breaking his silence. The Arizona Supreme Court said, "[L]ooking at

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[3] Some police officers' testimony, including that just referenced, used the name "Barefield" in speaking about Petitioner.

Edwards' statement in the context made, that . . . it must be interpreted as a request for counsel and as a request to remain silent until counsel was present." 594 P.2d at 77 (J.A. 16).

Edwards was taken from the police station to the jail, where he was held in isolation overnight. Edwards described it as "solitary . . . a hole with slats in it" (J.A. 76). The next morning, a jail detention officer told Edwards that detectives were there to see him. Edwards said, "I refused to come out of the hole . . . I told them I didn't want to talk to nobody." (J.A. 77.) But the detention officer "told me I had to talk to him". *(ibid.)* Edwards was thereupon taken to a small, windowless interview room in the interior of the County Jail where Detectives Marmion and Milne were waiting to question him.

These detectives worked for Detective Bunting, who had questioned Edwards the day before. They said they did not know that he had made the statement about an attorney, although Milne knew Edwards had been interrogated and "assumed he didn't want to give a statement at that time" (J.A. 65). Bunting, to whom Edwards had made the request for counsel, had instructed Detective Milne to go the jail to interview Edwards (J.A. 96),[4] although he did not tell Milne of the prior

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[4] This fact did not come to light at the pretrial motion to suppress, but was admitted by Milne at Edwards' first trial (J.A. 96). Bunting denied it, but it makes no difference because the interrogating police are charged with Bunting's knowledge. See note 24, *infra*.

rogation and request for counsel. They knew that an attorney would not be appointed for him until the afternoon. In Arizona, persons arrested on warrants issued upon a felony complaint are brought before a magistrate, and indigents like Edwards are assigned to the public defender, or appointed counsel, at that time (J.A. 42). The interrogating Detective Marmion and his supervisor, Bunting, were aware of this and that Edwards' first appearance would occur at 1:30 p.m. after Marmion had interrogated him (J.A. 42, 135-136).

As had been true of the evening before, the interrogation was for use at trial, not for investigative purposes. Marmion went out to the jail "to see what [Edwards] was going to tell me on that particular day" (J.A. 51), and Milne was sent along to be "a witness to any statements that he made" (J.A. 68).

Edwards was read his *Miranda* rights at the jail interrogation. He told Marmion that he didn't yet have an attorney (J.A. 52). When asked at the supression hearing before trial why he had not once again told these detectives that he wanted an attorney, he responded, "I didn't think you had to keep asking for an attorney over and over and over." (J.A. 84.) According to the detectives, whose testimony was credited by the trial court, Edwards asked to hear the taped statements of Soto, another of the accused, and some nine minutes or more of the Soto tape recording was played to him. Edwards then said he would tell the detectives what heppened but would not give a taped statement (J.A. 123). Edwards told Marmion he would not tape a statement because he

did not want the statement used against him in a court later (J.A. 54). Marmion responded, "Big deal. There are two of us. We can testify about it." Edwards said, "No, I don't want to give one." (J.A. 54.) But then he made inculpatory statements, in which he described for the detectives how the robbery was planned and carried out. He said that he had gone into the bar, kept watch over the barmaid during the robbery, and overheard Cleveland Reed fire two shots, which apparently did not strike anyone. He took the barmaid into the office of the bar, where Reed and the bar owner were, and watched as Reed took money and some other articles of property. Then the two of them, with the others, fled (J.A. 124-125).

After leaving the interrogation room, Detective Marmion tape recorded his recollections of the interview, which he erased after preparing a standard written report of the interrogation. On the afternoon of the day that he had been interrogated at the jail over his objections, Edwards was appointed counsel at his initial court appearance. Three or four days later, the detectives went back to the jail to attempt to obtain a statement, but he would not give one (J.A. 128).

At a hearing before trial, the court initially suppressed the confession, holding that Edwards had exercised his rights to remain silent and to have advice of counsel before making any statements, and that this decision had not been scrupulously honored by the police (J.A. 92). The court felt it was significant that the detectives knew that Edwards was about to be provided

appointed counsel, and also that the detectives, and not Edwards, initiated the interrogation. Three days later, the court changed its mind, on the basis of an Arizona opinion that had not been earlier cited to it,[5] and concluded that this Court's opinion in *Michigan* v. *Mosley,* 423 U.S. 96 (1975), permitted the police conduct that obtained the confession (J.A. 95). The court concluded that Edwards' statement at the jail had been voluntary (J.A. 91, 95), but did not find that Edwards had waived his Fifth and Sixth Amendment rights.

It took two trials to convict Edwards, there having been one mistrial when the jurors could not reach a verdict. At his second trial, Marmion and Milne testified to the incriminating statements made by Edwards, as they had at his first trial (J.A. 124,142). Edwards did not testify, but in the final argument urged the jury to find that he had not confessed.[6]

On appeal, Edwards reasserted his Fifth and Sixth Amendment claims, which had first been raised at the pretrial suppression hearing, that the confession should have been suppressed. As has been noted, the Arizona Supreme Court agreed that, on the evening of his arrest, Edwards had invoked his rights to remain silent and to have counsel before making further statements. Over dissent, however, it concluded that Edwards' *Miranda* rights and his Sixth Amendment rights were honored. It concluded that the "totality of circumstances" volun-

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[5] *State* v. *Travis*, 26 Ariz. App. 24, 545 P.2d 986 (1976).

[6] With the aid of advisory counsel, Edwards conductd much of his own defense.

tariness test of *Schneckloth* v. *Bustamonte,* 412 U.S. 218 (1973), applied and was satisifed. It therefore held that the confession was properly admitted (J.A. 18-19).

SUMMARY OF ARGUMENT

This case depends upon four critical facts. First, when Robert Edwards was arrested, the police thought this case to have been solved. They were not investigating when they interrogated him, but instead were seeking evidence usable in court. Secondly, the police interrogations under consideration occurred after the State of Arizona had formally begun prosecution of Edwards. A complaint had been filed which, under Arizona law, was one of two ways of formally commencing a felony prosecution. Thus, this case must be determined under those rules that apply where a prosecution is ongoing, and the responsibility of the courts to insure a fair trial has begun. Third, as both the trial court and the Arizona Supreme Court found, Edwards did ask to be afforded counsel on the evening of his arrest. Thus, that part of the doctrine of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), was invoked which imposes stricter burdens upon the State, when an accused has asked for counsel. Finally, after Edwards had been jailed overnight, his interrogation the next day was initiated by the police who knew that he would shortly get a lawyer. Edwards did not want to talk to the police.

The following argument analyzes three constitutional guaranties that were involved in this case, in a somewhat parallel manner but derived from separate

portions of the Constitution. If properly applied in this case, each of them independently prohibits the reception of this confession into evidence and precludes an argument that Edwards waived his Fifth, Sixth and Fourteenth Amendment rights by acquiescing to the State' request to talk with the detectives. The final section of the argument deals with the issue of waiver, if that is necessary.

In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), this Court established a flat prohibition against further questioning of an accused who is in custody, if he asks for the assistance of counsel. The unqualified nature of such a rule has been reiterated by this Court in later cases. The better reasoned cases from the Courts of Appeal and the state courts also impose such a flat rule against the police reinterrogating a suspect who has asked for counsel but not yet received it. Where an accused in custody has asked for counsel, he has recognized that he needs help in dealing with the authorities and, therefore, the need for protecting the privilege against self-incrimination discussed in *Miranda* and succeeding cases is greater because of the acknowledged vulnerability of this particular accused who has asked for a lawyer. In addition, at least in cases like this one where the interrogation is for use at trial, and not to solve the crime, any hardship or inconvenience to the law authorities is minimal, if such inconvenience is relevant. All that need occur is for the police to leave the accused alone for several hours or a day or so, until he can consult with counsel. In any event, this case only seeks such a rule

against interrogations initiated by the police. Under proper circumstances, where an accused changes his mind after asking for a lawyer, reinterrogations may be permitted. That situation is not here at issue.

Secondly, Petitioner had a Sixth Amendment right to the assistance of counsel which arose by virtue of the fact that criminal prosecution had commenced against him. Thus, his interrogation was a critical pretrial stage, for which he was entitled to a lawyer's assistance. Petitioner's need for a lawyer was especially great in this case because one possibility that was available to Edwards was plea bargaining. Before Edwards could obtain his counsel and attempt such bargaining, however, the intentional interrogation by the detectives had obtained what they would other wise have been bargaining for, his confession usable in court. This case is very similar to *Brewer* v. *Williams,* 430 U.S. 387 (1977), except that in *Brewer* the accused had already consulted with counsel. Here, Edwards had not. Far from that being a ground not to find that the right to counsel had attached and was violated, it is all the more reason to hold that the interrogation by the police at the county jail violated Edwards' right to counsel.

A third constitutional violation stems from the fact that the police intentionally reinterrogated Edwards before he could obtain appointed counsel. Where the interrogation is carried out after the commencement of prosecution, the due process clause applies with greater force, to insure that the accused receives fundamental fairness in all aspects of a trial and in all pretrial critical

stages. Most courts conclude that the deliberate interrogation of an accused without telling his counsel is improper and unethical. Others find it to be grounds for excluding his confession. The pervasive disapproval of such interrogations, at least where the accused has not requested to speak to law officers, demonstrates the widespread recognition of unfairness which makes out a violation of the due process clause of the Fourteenth Amendment. Thus, just as the State may not knowingly make use of perjured testimony, or knowingly fail to give a defendant favorable evidence, it may not carry out an interrogation after formal prosecution has begun, with all the potential for deception, psychological gamesmanship and trickery that normally is involved in such interrogations, unless defense counsel is given an opportunity to be present, assist the accused and even the stakes.

Finally, the record in this case will not support a waiver. To prove waiver of Sixth Amendment right to counsel, there must be a very high showing of the intentional relinquishment of a known right; that it was expressly waived. The burden of proving that an accused has given up the right to counsel is the same high standard as for establishing that other constitutional rights affecting the fairness of a trial, such as the right to a jury or to confront the witnesses against him were waived. There is nothing in the record from which such a waiver could be adduced. The same test should apply to determine whether a waiver of the *Miranda* rights occured, inasmuch as Edwards had claimed his right to

counsel. Even if that is not the case, however, a voluntary waiver must be found, on all the circumstances, not including the fact that a statement was made. Taking away that fact, in this case, leaves only the facts that Edwards decided not to make a statement until he got a lawyer, that he told the detention officers at the Pima County Jail on the morning after his arrest that he did not want to speak with anyone, and that he told his interrogators he would not make a taped statement because he did not want it used against him in a court of law. These are not waiver facts.

Because of the violations of Edwards' Fifth, Sixth and Fourteenth Amendment rights of counsel, against compulsory self-incrimination and to receive due process, his confession should have been suppressed.

ARGUMENT

I. The Confession Should Have Been Excluded Because It Was Obtained In Violation Of The Fifth And Sixth Amendment Protections Elaborated In *Miranda* v. *Arizona.*

This case again involves this Court in determining whether police questioning of an accused in the secrecy of a jail has undercut the Petitioner's desire to claim his privilege against self-incrimination. Probably no constitutional problem has required so much of this Court's attention as that arising under the Fifth and Sixth Amendments when the police undertake, by secret interrogation, to obtain a confession so that a criminal conviction can be won.

In case after case, it has been established that coerced confessions are not to be permitted. *Culombe* v. *Connecticut,* 367 U.S. 568 (1961); *Brown* v. *Mississippi,* 297 U.S. 278 (1936). Involuntary confessions lack trustworthiness as evidence because the conditions under which they are obtained may be such as would compel an innocent person to incriminate himself. *Lisenba* v. *California,* 314 U.S. 219 (1941). By allowing the use of coerced confessions, courts lend judicial sanction to the illegal methods by which the statements were obtained. To do so would denigrate the esteem and respect which the judiciary must be accorded if it is to function effectively in a free society. *Townsend* v. *Sain,* 372 U.S. 293 (1963); *Blackburn* v. *Alabama,* 361 U.S. 199 (1960).

Coercion need not take the physical form of the rack, the rubber hose or the blackjack. Spirit and mind may be as effectively twisted to an interrogator's will as may the body. Psychological compulsion thus has received, no less than physical coercion, the reprobation it deserves. *Chambers* v. *Florida,* 309 U.S. 227 (1940). Mental and emotional coercion take many forms, the most common of which (incomunicado incarceration, Mutt and Jeff routines, physical and psychological isolation) are used frequently by police during custodial interrogation in an effort to secure admissions of guilt from criminal suspects.[7] Use of these techniques has been found to be so powerful as to inherently constitute coercion. But so frequently did such instances occur,

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[7] *See* F. Inbau and J. Reid *Criminal interrogation and Confessions* (2d ed. 1967); R. Aubrey and R. Caputo *Criminal Interrogation (1st ed. 1965).*

that in *Miranda* v. *Arizona,* 384 U.S. 436 (1966), this Court concluded that, only by effectively warning suspects of their rights to silence and counsel under the Fifth and Sixth Amendments, and by scrupulously honoring any assertion of those rights, would the inherent compulsion of custodial interrogation be dissipated to the extent that statements made during such interrogation might safely be accepted as voluntary and admitted into evidence in a court of law. *Miranda, supra; Michigan* v. *Mosley, supra,* 423 U.S. 96 (1975). If a suspect is not afforded the protection mandated by this court, confessions are presumed coerced and inadmissible. *Id.* Here, Edwards sought to have the protection of counsel, but the detectives obtained their result before he could get it.

A. The presence of counsel is essential in the setting of custodial interrogation as a means of insuring that constitutional rights are respected.

Of special importance in the present case is the right to the presence of legal counsel during custodial interrogation. Through the free and unfettered exercise of this right, a criminally accused can mitigate the coercive influences inherent in custodial interrogation. *Miranda, supra; Escobedo* v. *Illinois,* 378 U.S. 478 (1964). An attorney can act as an observer, insuring that his client is treated within the limits imposed by the Constitution. He can also take a more active role as adversary for his client's interests, giving advice and assistance and assuring that an accused will not face alone the tremendous

powers of the state. *Fare* v. *Michael C.*, 442 U.S. 707 (1979).

Recognizing the pivotal role of counsel in our system of justice, this Court held in *Miranda* that a request for counsel by one undergoing custodial interrogation operates as an assertion of Fifth and Sixth Amendment rights and bars further questioning.

> "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present." 384 U.S. at 474.

A request for counsel is an acknowledgement by the accused that his position vis-a-vis the state is one of weakness,[8] and that he is unable or incompetent to make his own decisions. *Michigan* v. *Mosley*, 423 U.S. 96 (1975) (White, J., concurring); Case Note, 31 Vand. L. Rev. 1069 (1978). Mr. Justice White demonstrated in *Mosley* the analytical difference between an assertion of the right to silence and of the right to counsel. An assertion of the former can be interpreted as an affirmation of the suspect's willingness to conduct his relations with the police on his own. It is, therefore, proper that lines of communication be kept open, *Michigan* v. *Mosley*, 423 U.S. at 110, n. 2, so that authorities may ascertain if the defendant has chosen for himself a different course of action. This effectuates *Miranda*'s major premise that an individual should be free to make his

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[8] Edwards' case is instructive. He made an unsuccessful attempt to negotiate with the prosecution on his own, and then recognized that he needed a lawyer's help in dealing with the State. By the time he got it, the State had dealt with Edwards.

own decisions in the exercise of a free and rational intellect. *Id.*, at 110.

An assertion of the right to counsel, on the other hand, is evidence that the accused has already exercised his right of self-determination by deciding that he needs the assistance of a lawyer. Any necessity for keeping open lines of communication may be fulfilled in this situation by contacting the suspect's attorney, *id.*, and further questioning of the defendant is never required.[9]

B. A request for counsel must operate as an absolute bar to police-initiated reinterrogation, until counsel has been provided.

The specific issue to be resolved in the present case is what effect a suspect's assertion of the right to counsel must have upon future attempts to interrogate the suspect. This Court has indicated on several occasions that no further interrogation may take place. In arguing against a per se bar to interrogation following an assertion to the right to silence, Mr. Justice White noted:

> "The court showed [in *Miranda*] . . . that when it wanted to create a per se rule against further inter-

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[9] This is not to say that, simply because a suspect has asserted his right to silence but not to counsel, the police may badger the accused until a confession is obtained. Authorities must scrupulously honor a suspect's decision not to speak, *Michigan* v. *Mosley, supra,* and some courts have applied as stringent a bar to further interrogations in such circumstances as if the suspect had requested counsel. *United States* v. *Crisp,* 435 F.2d 354 (7th Cir. 1970), *cert. denied,* 402 U.S. 947 (1971); *People* v. *Superior Court of Marin County,* 118 Cal. Rptr. 617, 530 P.2d 585 (1975)

> rogation after assertion of a right, it knew how to do so. The Court . . . said 'if the individual states that he wants an attorney the interrogation must cease *until an attorney is present.' Miranda* v. *Arizona,* 384 U.S. at 474 (1966)." *Michigan* v. *Mosely*, 423 U.S. 96, 109 (1975) (White, J., concurring) (emphasis in original).

Further support for the proposition that no interrogation may take place is found in *Fare* v. *Michael C.*, 442 U.S. 707 (1979). Defendent, a juvenile, had requested, after his arrest, to speak with his probation officer. This request was denied by the police, and defendant argued that his request had been the functional equivalent of an assertion of his Fifth Amendment rights. This Court rejected that contention, noting the unique position occupied by attorneys.

> "The per se aspect of *Miranda* was thus based on the unique role the lawyer plays in the adversarial system of criminal justice in this country. . . . For this reason, the Court fashioned in *Miranda* the rigid rule that an accused's request for an attorney is per se an invocation of his Fifth Amendment rights, requiring that all interrogation cease." 442 U.S. at 719.

Accord, State v. *Nash,* 407 A.2d 365 (N.H. 1979).

The lower Federal courts and the courts of various states have adopted three different positions on what the authorities may do once an accused, in custody, asks for a lawyer after being given *Miranda* warnings. Some courts bar or greatly restrict the ability of the police to engage in further interrogation following an assertion of

a suspect's constitutional rights, in effect adopting a strict per se approach. Some courts, while expressing approval of a per se rule, generally allow defendant-initiated interrogation sessions.[10] Finally, some courts have adopted a case-by-case analysis in determining the validity of a waiver and do not attach any special import to the suspect's initial request for counsel.

United States v. *Priest*, 409 F.2d 491 (5th Cir. 1969), is a leading example of a flat prohibition against reinterrogation. There, defendant was interrogated by an agent of the Federal Bureau of Investigation while in the hospital. He was advised of his rights and asked to sign the FBI's standard waiver form. This he refused to do until he had consulted a lawyer. Ingnoring his request, the FBI agent forged ahead with the interrogation until he had obtained a confession. The court held that there can be no waiver of counsel following a request for one.

> "Where there is a request for an attorney prior to any questioning, as in this case, a finding of knowing and intelligent waiver of the right to an attorney is impossible." 409 F.2d at 493.

This holding is based on the explicit language in *Miran-*

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[10] The record in this case illustrates, and the Arizona Supreme Court so found, that Edwards had no part in the initiation of the interrogation session which resulted in his confession. 122 Ariz. at 209. Therefore, whether the rule is that "post-assertion" interrogation is totally barred or is barred unless the defendant initiates the conversation, Edwards' statements would still be inadmissible.

da which seems to create such a per se barrier to post-assertion interrogation.[11]

The Fifth Circuit recently reaffirmed its holding in *Priest*. Before it was a case in which a defendant was arrested and incarcerated on murder charges. When he was interrogated by the police on these charges, the defendant made a request for the presence of his lawyer. This request was met with the rejoinder that his lawyer would not permit him to tell his side of the story. The interrogation was continued and resulted in a confession. The court held that the police had violated the "per se rule . . . that requires all custodial interrogation to cease once the suspect asks for an attorney." *Thompson* v. *Wainwright*, 601 F.2d 768, 770-71 (5th Cir. 1979).[12] It also held that *Nash* v. *Estelle*, 597 F.2d 513

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[11] "If. . . [the suspect] indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." *Miranda* v. *Arizona*, 384 U.S. at 444-45.

'If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning." 384 U.S. at 474.

[12] *See, also, Moore* v. *State*, 261 Ark. 274, 551 S.W.2d 185 (1977); *Webb* v. *State*, 258 Ark. 95, 522 S.W.2d 406 (1975); *People* v. *Brake, 191 colo. 390, 553 P.2d 763 (1976); People* v. *Cook*, 78 Ill. app. 3d 695, 397 N.E.2d 439 (1979); *Stevens* v. *State*, 265 Ind. 396, 354 N.E.2d 727 (1976) (statements inadmissible in case in chief); *State* v. *Boone*, 220 Kan. 758, 556 P.2d 864 (1976); *Murphy* v. *State*, 336 So. 2d 213 (Miss. 1976), *cert. denied*, 429 U.S. 1076 (1977) (statements are not voluntary when made after a request for attorney which is not honored); *People* v. *Bowers*, 45 A.D.2d 241, 357 N.Y.S.2d 563 (1974) (police may ask defendant to reconsider his request for an attorney but cannot go beyond that into interrogation).

(5th Cir. 1979) (en banc), had allowed further questioning only when the request for counsel is equivocal, and then only to the extent necessary to clear up any confusion as to the suspect's intentions. Once that confusion is dissipated, if it is clear that the defendant does want counsel's assistance, interrogation may not proceed in counsel's absence.

Illustrative of those cases in which a waiver may occur if the defendant seeks to talk to the police, and initiates the contact, is *United States* v. *Clark,* 499 F.2d 802 (4th Cir. 1972), where defendant had been arrested and presented for a preliminary hearing before a Federal magistrate on bank robbery charges. After the hearing, he was interviewed by FBI agents and asserted his right to counsel. He was thereupon transportated to the county jail. In circumstances similar to the case at bar, the same agents, knowing defendant had not yet procured counsel, reinterrogated defendant and received damaging admissions from him. The court held that defendant's Fifth and Sixth Amendment rights had been violated when, having previously asserted his right to counsel, "he was interviewed at the insistence of government agents without the presence of an attorney." 499 F.2d at 806. Lack of initiation of the interview by defendant was an important factor in holding defendant's alleged waiver to be involuntary.

Another case factually similar to that *sub judice* is *United States* v. *Womack,* 542 F.2d 1047 (9th Cir. 1976). There, the defendant was arrested in connection with a kidnapping and murder. When interrogated, he

twice requested appointment of counsel, but these requests were ignored. As in the instant case, the police returned uninvited to the jail the next day to reinterrogate the suspect. Womack later testified that he did not reassert his request for an attorney because his earlier requests had been to no avail and he did not believe any further resistance would benefit him. 542 F.2d at 1049. Petitioner Edwards, similarly, did not renew his request for counsel out of the same sense of frustration. *State* v. *Edwards,* 122 Ariz. at 217.[13] The *Womack* court held that, if the police failed to honor immediately a Fifth and Sixth Amendment request for counsel, interogation may not be continued. The state there failed to show a voluntary waiver, though the court did not preclude such possibility. The defendant's frustration at the police officers' blatant disregard of his request for counsel weighed heavily in favor of this finding. Similar circumstances militate for a similar finding in the instant case.

In *United States* v. *Blair,* 470 F.2d 331 (5th Cir. 1972), *cert. denied sub nom. Crews* v. *United States,* 411 U.S. 908 (1973), defendant was arrested in a United States Post Office and, upon being informed of his rights, requested the presence of his attorney. The interrogating postal inspector ignored this request, continued

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[13] Compare Womack's statements when asked why he did not renew his request for counsel ("because every time I asked for one, I never got one, so I gave up on the fact", 542 F.2d at 1051), with Edwards' response to the same question ("I didn't think you had to keep asking for an attorney over and over and over", J.A. 84).

interrogation and obtained incriminating statements. The suppression of these statements was upheld on the grounds that *Miranda's* prohibition of post-assertion interrogation "could hardly have been more uncompromising." 470 F.2d at 338. *See People* v. *Medina*, 37 Ill. App. 3d 1029, 347 N.E.2d 424 (1976). There was no evidence of defendant-initiated waiver, so the statement could not be used.[14]

The cases just discussed establish that postassertion interrogation is barred completely in some jurisdictions and barred in others unless initiated by the suspect. The result in the instant case would be the same regardless of the theory chosen. Edwards clearly did not initiate the "fatal" interview — he was told by the jailor that he had no choice in the matter. His statements would not be admissible unless police are allowed to initiate, on their own, reinterrogation following an accused's assertion of the right to counsel.

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[14] Other cases adopting a flat prohibition against resumed questioning, unless the defendant requests it, are *United States* v. *Massey*, 550 F.2d 300 (5th Cir. 1977) (defendant did not invite post-assertion interrogation, thus, no valid waiver); *People* v. *Harris*, 191 Colo. 234, 552 P.2d 10 (1976); *People* v. *Salazar*, 189 Colo. 429, 541 P.2d 676 (1975) (defendant must affirmatively withdraw a request for counsel); *State* v. *Crisler*, 285 N.W.2d 679 (Minn. 1979); *Commonwealth* v. *Mercier*, 451 Pa. 221, 302 A.2d 337 (1973); *State* v. *Turner*, 32 Ore. App. 61, 573 P.2d 326 (1978) (defendant may initiate conversations and police may make simple requests for reconsideration but police may not induce a post-assertion waiver), and *State* v. *Marcum*, 24 Wash. App. 441, 601 P.2d 975 (1979) (all questioning must stop but defendant may initiate waiver).

The adoption of a prohibition against reinterrogation is clearly mandated by *Miranda, Fare* v. *Michael C.* and *Mosely*. It is also fully consistent with the proposition that an accused in jail, who asks for the help of a lawyer, feels overmatched and is more susceptible to being coerced. In addition, it does not deprive the police of the opportunity to conduct an interrogation, but rather would only require that an accused receive what he is constitutionally entitled to — the right to consult counsel at a meaningful time, and to make a timely unfettered choice whether or not to speak.

C. Some Jurisdictions Do Allow Renewed Interrogations by the Authorities After a Request for Counsel, but Close Analysis Reveals That This Is Not the Better Rule.

The case adopting this position, relied upon by the Arizona Supreme Court in its opinion below, is *United States* v. *Rodriquez-Gastelum*, 569 F.2d 482 (9th Cir.) (en banc), *cert. denied,* 436 U.S. 919 (1978). Defendant was stopped as he was driving a car, later found to contain marijuana. After his arrest, he was asked if he wanted to talk about the marijuana and replied he would if he had an attorney. The Drug Enforcement Administration officer immediately asked, "Do you want to talk to me now without an attorney?", to which defendant replied, "That's fine." 569 F.2d at 483. The court ruled that there should be no per se bar to post-assertion interrogation when the defendant validly waives his previously asserted right to counsel. The basis

for this decision was that a per se rule would unnecessarily handcuff the police in the exercise of their duties and deny a suspect the opportunity to change his mind and talk to the police if he chose, in the free exercise of his will, to do so. Other courts have also taken such a position.[15]

Yet, several important considerations demonstrate that the reasoning of these cases cannot withstand close analysis.

Initially, it should be noted that the "unnecessarily handcuff the police" argument is unpersuasive and irrelevant. It fell on deaf ears, and rightfully so, when brought before this Court in *Miranda*, 384 U.S. at 441. Furthermore, to say that a rule designed to effectuate protections of the Fifth and Sixth Amendments should not stand because it hampers the police is to misconstrue those amendments totally. They are designed to protect the individual in his exercise of free will, not the police. Moreover, as already noted, what is involved is a delay amounting, normally, only to a matter of hours until a lawyer's advice is provided to the prisoner. Especially in

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[15] The following list, while not exhaustive, is indicative of cases following this position. *Blasingame* v. *Estelle*, 604 F.2d 893 (5th Cir. 1979); *White* v. *Finkbeiner*, 611 F.2d 186 (7th Cir. 1979); *United States* v. *Brown*, 569 F.2d 236 (5th Cir. 1978) (en banc); *United States* v. *Grant*, 549 F.2d 942 (4th Cir.), *cert. denied*, 432 U.S. 908 (1977); U.S. v. *Pheaster*, 544 F.2d 353 (9th Cir. 1976), *cert. denied sub nom. Inciso* v. *United States*, 429 U.S. 1099 (1977); *Biddy* v. *Diamond*, 516 F.2d 118 (5th Cir. 1975), *cert. denied*, 425 U.S. 950 (1976); *United States* v. *Hodge*, 487 F.2d 945 (5th Cir. 1973); *United States* v. *Springer*, 460 F.2d 1344 (7th Cir.), *cert. denied*, 409 U.S. 873 (1972)

a case like this one, where trial preparation and not crime solving was the goal, the police would only be "handcuffed" from taking unfair advantage.

The Arizona Supreme Court contended, 122 Ariz. at 211, as do others, that a per se rule would not allow a person his right to self-determination but would imprison him in his privileges.[16] It is anomalous, however, to talk of freeing an individual to make up his own mind when the result of such a rule is the overbearing of a suspect's will by allowing continued custodial interrogation which, especially in the face of repeated attempts to halt the interrogation, is presumptively coercive. Further, the per se rule against police-induced reinterrogations would, in fact, allow self-determination. Arguments to the contrary overlook the fact that, in true cases of a suspect asking for counsel, the suspect has already acted in the exercise of his freedom of choice and has chosen to secure the assistance of legal counsel.

Perhaps more significant in this case than the fallacious reasons behind the *Rodriquez-Gastelum* rule is the fact that Robert Edwards' request for counsel and refusal to talk without a lawyer was never expressly withdrawn. Hence, *Rodriquez-Gastelum* and similar cases are quite unlike Edwards' situation. Cases such as *Rodriquez-Gastelum*, *supra*, and others following its position often involve an uncertain request, or a tentative one which is not confirmed. The issue here is

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[16] *United States* v. *Rodriguez-Gastelum*, 569 F.2d at 487 (*citing Adams* v. *United States ex rel, McConn*, 317 U.S. 269 (1942)).

what the authorities may properly do when the accused has, in fact, asked for counsel. That is what Edwards did, and the police understood it as such (J.A. 92). In *Rodriquez*, the accused said in almost the same breath that he would talk if he had an attorney, and that he would do so without. If the request for counsel is honored, the accused will have the advice of a lawyer, usually within hours, and, at most, in several days. The police can then either reinterrogate or not, as the advised defendant may choose. That is his right. If a defendant, who can retain his own counsel, deliberately delays in doing so, that may be reason enough to allow reinterrogation. But that issue is not presently before the Court. All that this case requires is a common sense determination that, once a suspect in custody asks for a lawyer, only he can reestablish communication before he speaks with his lawyer. The opinion of the Arizona Supreme Court, and other similar cases, obviously allow the least possible freedom for such self-determination, by placing the decision to reinstitute interrogation not in the hands of the individual, but in the hands of the police.

There are additional reasons which compel the conclusion that authorities should be precluded from reapproaching a suspect who has already asked for counsel. If the request for counsel is not honored and reinterrogation is undertaken, the inherent compulsion to speak, which *Miranda* strove to dissipate, is not mitigated; rather, it is intensified by evidencing a callous

disregard for a suspect's rights.[17] The case at bar shows how a suspect may feel compelled to give up the fight in the face of blatant refusal to honor an assertion of the right to counsel. *United States* v. *Womack*, 542 F.2d 1047 (9th Cir. 1976), illustrates the same point. The accused "gave up" because "Every time I asked for one, I never got one." 542 F.2d at 1051. *See, also, United States* v. *Hernandez*, 574 F.2d 1362 (5th Cir. 1978), where the court held that repeated readings of *Miranda* rights to a suspected drug trafficker, when the suspect continuously asserted his right to silence, was just the sort of subtle compulsion *Miranda* sought to eliminate. Furthermore, a rule allowing police to reinterrogate at will, thus forcing a suspect intent on utilizing his rights to reassert them at every juncture, will benefit only the hardened criminal who not only knows that escape from punishment may be achieved by baiting the police into overreaching, but who is also relatively unaffected by custodial atmospheres. *People* v. *Randall*, 83 Cal. Rptr. 658, 464 P.2d 114 (1970).

II. The Confession Should Have Been Suppressed Because It Was Taken In Violation Of Edwards' Sixth Amendment Right To Counsel Which Had Arisen Because Formal Prosecution Had Begun Before The Jail Interrogation.

The events of 20 January 1977, when the police hurried to reinterrogate Edwards at the county jail

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[17] *See, for example, People* v. *Washington*, 41 Ill. App. 3d 475, 354 N.E. 2d 501 (1976); *State* v. *Stevenson*, 523 S.W.2d 349 (Mo. 1975).

before he obtained appointed counsel at his first appearance that afternoon, violated not only *Miranda* v. *Arizona*, 384 U.S. 436 (1966). They infringed, as well, upon his right to the assistance of counsel at critical stages in advance of trial.

This case presents the Sixth Amendment problems such as were faced by the Court in *Massiah* v. *United States*, 377 U.S. 201 (1964); *Escobedo* v. *Illinois*, 378 U.S. 478 (1964); *Brewer* v. *Williams*, 430 U.S. 387 (1977); and *United States* v. *Henry*, _____ U.S. _____ (No. 79-121, June 16, 1980). All of these cases recognize that the right of an accused to have the assistance of counsel for his defense extends to various critical pretrial stages occurring after the commencement of prosecution against the accused, "whether by way of formal charge, preliminary hearing, indictment, information or arraignment", *Kirby* v. *Illinois*, 406 U.S. 682, 689 (1973). Here, prosecution had begun against Edwards. The right to counsel that he enjoyed on the morning of his interrogation in the Pima County Jail was a concomitant of the process of judicial prosecution, and not solely a "prophylactic means of safeguarding Fifth Amendment rights", *Doyle* v. *Ohio*, 426 U.S. 610, 617 (1976).

Edwards was arrested in January 1976, some fifteen months after the robbery for which he was charged, pursuant to an arrest warrant issued on the authority of a criminal complaint (J.A. 70, 101). In Arizona, the filing of a complaint before a magistrate is one of two methods by which felony actions may be commenced.

Ariz. R. Crim. P. 2.2 (17 Ariz. Rev. Stat. Annot.). A complaint is a written statement of the essential facts constituting a public offense, made upon oath before a magistrate. Rule 2.3. Once a magistrate receives a complaint, he is required to examine such witnesses as he deems necessary and determine whether there is reasonable cause to believe an offence has been committed and the defendant committed it. Rule 2.4. He may either dismiss the complaint or proceed to issue a summons or a warrant of arrest. Ariz. R. Crim. P. 3.1 (Ariz. Rev. Stat. Annot.) These steps had been taken before Edwards had been arrested and incarcerated in the Pima County Jail overnight. The initial appearance at which the detectives knew Edwards would obtain appointed counsel was the procedure specified in Ariz. R. Crim. P. 4.1 and 4.2 (17 Ariz. Rev. Stat. Annot.). Such an appearance may include an arraignment, the appointment of counsel for indigents, and the scheduling of a preliminary hearing for those cases, such as this one, where a felony had already been charged by complaint.[18]

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[18] Rule 4.2 provides:

"*Rule 4.2. Initial Appearance*

a. *In General.* At the defendant's initial appearance, the magistrate shall:

(1) ascertain the defendant's true name and address and, if necessary, amend the formal charges to reflect it, instructing the defendant to notify the court promptly of any change of address;

(2) inform him of the charges against him;

(3) inform of his rights to counsel and to remain silent;

(4) appoint counsel if the defendant is eligible for and requests appointed counsel under Rule 6; and

(5) determine the conditions of release in accordance with Rule 7.2.

The State, then, had commenced its prosecution of Petitioner Edwards when the Complaint was filed. *Moore* v. *Illinois*, 434 U.S. 220, 228 (1977).[19]

The interrogation conducted by Officers Marmion and Milne was for trial preparation purposes. Marmion went down to the jail to "see what he was going to tell me on that particular day" (J.A. 51), and Milne went along at the direction of Sergeant Bunting, to be "a witness to any statements that he made" (J.A. 68). It was purely an attempt to obtain a confession from Edwards. Accordingly, there is no doubt that the agents set out to "deliberately elicit" incriminating statements from Edwards within the meaning of *Massiah* v. *United States*, 377 U.S. 201 (1964), and *United States* v. *Henry*, _____ U.S. _____ (No. 79-121, June 16, 1980). Of course, there is no doubt that this kind of confronta-

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b. *Misdemeanors: Felonies Charged By Indictment.* When a defendant charged with a misdemeanor or indicted for a felony is brought before a magistrate for his initial appearance, he shall, in addition to the procedures set forth in Section a, be arraigned in the manner prescribed by Rule 14, if counsel is present or waived. If the appearance is before a magistrate without jurisdiction to try the offense, the magistrate shall transfer the case to the proper court for arraignment.

c. *Felonies Charged By Complaint.* When a defendant is charged in a complaint, the magistrate shall, in addition to the procedures required by Section (a):

(1) inform the defendant of the right to a preliminary hearing and the circumstances under which and procedures by which that right may be waived; and

(2) unless waived, set the time for a preliminary hearing in accordance with Rule 5.1."

[19] *United States ex rel. Robinson* v. *Zelker*, 468 F.2d 159 (2d Cir. 1972), *cert. denied sub nom. Zelker* v. *Robinson*, 411 U.S. 939 (1973). *Cf. Commonwealth* v. *Whiting*, 439 Pa. 205, 266 A.2d 738 (1970)

tion, after commencement of prosecution, designed to obtain an admissible confession at the trial of the accused, is that kind of critical stage at which Edwards was entitled to the presence and assistance of counsel. *Massiah, supra; Brewer* v. *Williams*, 430 U.S. 387 (1977); *United States* v. *Henry, supra.*

In this case, the interrogation of Edwards by Detectives Marmion and Milne was especially critical. It was, of course, an attempt to obtain a confession for use at trial, and to substitute interrogation, in an isolated jail house interview booth, for the trial. Counsel's presence was necessary to "minimize the imbalance in the adversary system", *United States* v. *Ash*, 413 U.S. 300, 309 (1973), "where the accused is confronted by his expert adversary" under circumstances where "the results might well settle the accused's fate", *Id*, at 310.

The fruits of Marmion's interrogation were not tape recorded, written down or formally acknowledged by Edwards in any way.[20] Edwards did not testify in his own defense at his trial. Thus, counsel's absence left Edwards "unable to present his version [of what occurred

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[20] Edwards at first testified, during the Motion to Suppress, that he had not made a statement (J.A. 49-50). Upon the resumption of the Supopression Hearing a few days later, he acknowledged that he had made a statement and that his prior testimony to the contrary was because "the D.A. was talking too fast. I was confused." (J.A. 80.) Indeed, the transcript of Edwards' previous day's testimony demonstrates some confusion (J.A. 49-50).

Curiously, Officer Marmion did not preserve the tape recording he made upon leaving the jail after interviewing Edwards on the morning before his initial appearance (J.A. 58-59), but simply prepared a routine "supplemental report" sometime later (J.A. 53).

at the jail] effectively without giving up his privilege against compulsory self-incrimination". *United States* v. *Ash, supra*, 413 U.S. at 313. In many cases, trials are won or lost on the basis of confessions. *Culombe* v. *Connecticut, supra; Miranda* v. *Arizona, supra.* If a suspect is denied his right to counsel at this stage of the proceedings when this most probative piece of evidence is being sought, his right to effective assistance of counsel at later stages is an empty promise. *Culombe* v. *Connecticut, supra; Crooker* v. *California*, 357 U.S. 433 (1958) (Douglas, J., dissenting).

The fact that inculpatory statements obtained from Edwards were received in evidence is not the only adverse effect of his loss of the right to counsel. On the night before, Edwards had asked Bunting about the prospects of "making a deal" and, according to Bunting, had spoken to the prosecuting attorney about the possibility of making a deal.[21] Edwards had then told Sergeant Bunting that he would obtain a lawyer before making a statement and before making a deal (J.A. 151), expressing himself in such a way that the trial court concluded Edwards intended for the deal to be based, at least in part, on his giving a statement in exchange for lenient treatment or some other accommodations from the State (J.A. 1). The next day, when Mar-

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[21] At the Suppression Hearing, Edwards agreed that he had wanted to make a deal and decided to wait to either make a statement or deal until after he obtained counsel, but testified that he did not ask to speak to the County Attorney, asking instead for a lawyer. He said he was surprised to find that the lawyer Bunting obtained for him by telephone was the District Attorney (J.A. 73).

mion and Milne went to the county jail, there was, according to their testimony, no further reference to the making of a deal. We can presume that Edwards did not realize the adverse effect of the admissions he was to make that morning upon any plea bargaining he might later undertake.

This Court has recognized that plea bargaining is "an essential component of the administration of justice" which "presupposes fairness in securing agreements between an accused and a prosecutor", *Santobello* v. *New York*, 404 U.S. 257 (1971). Plea bargaining is an inherent part of the modern system, *Blackledge* v. *Allison*, 431 U.S. 63 (1977); *Corbitt* v. *New Jersey*, 439 U.S. 212 (1978), and the Sixth and Fourteenth Amendment guarantees of counsel and due process apply fully as much to the plea bargaining process as to other essential or critical phases of the prosecution. It has also been recognized that, when entering into a plea bargain, the defendant is waiving substantial constitutional rights[22] and that the presence of counsel (or a valid waiver thereof) is necessary to insure due process of law. *Bodenkircher* v. *Hayes*, 434 U.S. 357, *reh. denied*, 435 U.S. 918 (1978); *Tollett* v. *Henderson*, 411 U.S. 258 (1973); *Brady* v. *United States*, 397 U.S. 742 (1970).

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[22] By pleading guilty, a defendant waives his right to put the state to its proof, his right to a trial by jury, his right to confront witnesses against him and his right not to incriminate himself. *U.S. Const., Amend. V; U.S. Const., Amend. VI; United States* v. *Brady*, 397 U.S. 742 (1970); *cf. Vont Moltke* v. *Gillies*, 332 U.S. 708 (1948) (emphasizing the importance of counsel when pleading guilty).

Thus, when Edwards was reinterrogated by Marmion and Milne, knowing that he had not yet been able to obtain counsel and did not have a lawyer, he was not just making incriminating statements to an expert adversary, but was also impairing his prospects for plea bargaining which, though not part of the State's written criminal procedures, offered informal opportunities that could have been extremely significant and beneficial to Edwards. That a bargain might have been reached for Edwards' testimony, to convict a co-defendant or assure his own conviction, in exchange for the reduction of charges or the minimization of a potential sentence, is hardly a novel concept to the criminal lawyer. This case involved a potential death penalty, an obvious potential goal for defense plea bargaining. It also involved a first-degree felony murder charge that depended for a conviction upon convincing a jury to accept felony murder instructions and to conclude that the robbery was a legal cause of the bar proprietor's death by heart attack. One co-perpetrator had already been given immunity. We can conclude that, on the night of his arrest, Edwards had appropriate concerns in wanting to bargain his testimony for some concessions, but decided that he was inadequate to the task of negotiation. It would have been difficult, if not impossible, for him to negotiate for himself without, at the same time, giving up his right to remain silent.

While the State was, of course, not obliged either to bargain with Edwards or to refrain from attempting to get a statement from him, *United States* v. *Washington*,

431 U.S. 181, 187 (1977), it was proscribed from frustrating and circumventing Edward's request for and right to counsel until such time as counsel's assistance would be virtually ineffective. Yet, that is what happened here. The right to counsel embraces counsel's assistance at such time and in such manner as to assure that his participation in trials or critical pretrial events is informed and effective. *Powell* v. *Alabama*, 287 U.S. 45 (1932). In its Rules of Criminal Procedure, Arizona recognizes that effective representation must occur "as soon as feasible after a defendant is taken into custody."[23] This Court can guarantee no less.

The interrogating officers, and Sergeant Bunting who sent Milne to be a witness to any possible statements, certainly knew that their morning's interrogation, if successful, would have the effect of frustrating Edward's right to appointed counsel.[24] Even had they not, the Sixth Amendment violation is no less prejudicial. Nor does it matter that Edward's right to counsel was

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[23] Ariz. R. Crim. p. 6.1(a) (17 Ariz. Rev. Stat. Annot. Supp.), specifies:

> "a. *Right to be Represented by Counsel.* A defendant shall be entitled to be represented by counsel in any criminal proceeding, . . . The right to be represented shall include the right to consult in private with an attorney, or his agent, *as soon as feasible after a defendant is taken into custody,* at reasonable times thereafter *and sufficiently in advance of proceeding to allow adequate preparation therefor.*" (Emphasis supplied.)

[24] Bunting dispatched Milne to interrogate Edwards, but even if he had not, Marmion and Milne were charged with Bunting's knowledge that Edwards wanted a lawyer. *People* v. *Ireland*, 75 Cal. Rptr. 188, 450 P.2d 580 (1969). *Cf. Whitely* v. *Warden*, 401 U.S. 560, 568 (1971); *Smith* v. *United States*, 358 F.2d 833, 835 (D.C. Cir. 1966).

violated at its inception, before he was given appointed counsel. *McLeod* v. *Ohio*, 381 U.S. 356 (1965). There, this Court, by summary reversal, applied *Massiah, supra,* to a case like this one, where the right to counsel attached but counsel had not yet been provided.

III. The Fourteenth Amendment Guarantees Of Due Process, Requiring That All Stages Of The Prosectuion Be Conducted Within Traditional And Accepted Notions Of Fundamental Fairness, Prohibit The Use Of A Confession Obtain After Prosecution Has Begun, Before The Accused Can Obtain Counsel's Advice Or Presence

Edwards' prosecution in court commenced upon the filing of the Complaint, and his interrogation on January 20 was to get him convicted. Realizing this, the focus of the prosecution efforts had shifted from investigative to prosecutorial. Consequently, not only had the Sixth Amendment right to counsel attached, but other constitutional guaranties that would affect the fairness of the judicial proceedings were afforded Edwards. The due process clause is among them.

It may be that, before the State has determined to prosecute an accused and has begun court proceedings to do so, the police can and should conduct interrogations using the range of deception and trickery that has been so widely reported, so long as the sum total is not a coerced confession or a violation of the warnings required and procedures specified in *Miranda* v. *Arizona.*

After prosecution commences, however, interrogation is a critical stage, and the jail house interrogation is a critical stage, and the jail house interrogation readily becomes an attempt not to investigate a crime, but to substitute inquisition in private for a public adversarial trial. Hence, while this Court may not be overly concerned with the propriety of such pre-critical stage police practices as obtaining a suspect's confession by falsely stating to defendant that his fingerprints were found at the scene of the crime,[25] a police officer/friend of the suspect falsely telling him that his job was in jeopardy,[26] or false lineups and other psychological tactics and techniques,[27] considerations of fundamental fairness must play a greater role when a critical stage is involved.[28] The possibilities for psychological gamesmanship and deception are almost limitless,[29] and permitting such tactics where the process is avowedly intended to replace obtaining testimony of the accused on the witness stand during a public trial, would have this Court placing its imprimatur on the sporting theory of justice that has long been discredited. *Cf., Wardius* v.

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[25] *Oregon* v. *Mathiason*, 429 U.S. 492 (1977).

[26] *Spano* v. *New York*, 360 U.S. 315 (1959).

[27] *See, generally,* White, *Police Trickery in Inducing Confessions*, 127 U. Pa. L. Rev. 581.

[28] Even at that, this Court has noted the difficulty in distinguishing between proper police conduct and methods offensive to due process. *See Haynes* v. *Washington*, 373 U.S. 503, 515 (1963).

[29] *See Kamisar Brewer* v. *Williams, Massiah, and Miranda: What is "Interrogation"? When does it matter?* 67 Georgetown L.J. 1, 16, 17, 23 (1978).

Oregon, 412 U.S. 470 (1973). And yet we do not ask that this Court conclude that policemen may not conduct interrogations in that manner after a criminal prosecution is commenced. Instead, we simply seek a holding that such an attempt may not occur unless and until an accused has obtained and consulted with counsel and counsel has an opportunity to even the odds by being present and assisting his client.

The initiation of such secret interrogations after prosecution is commenced is, as we will shortly show, a practice that has been severely criticized by members of this Court and other courts as "unethical", "unfair", "forbidden" and "undesirable". There is no reason that fundamental fairness as guaranteed by the Fourteenth Amendment should not govern this critical stage and this kind of evasion of the right to counsel.

This Court is accustomed to prohibiting the State from taking unfair advantage, both during trial and before it. A prosecutor is prohibited by the due process guaranties of the Fourteenth Amendment from taking advantage of false testimony and failing to correct it. *E.g., Napue* v. *Illinois*, 360 U.S. 264 (1959). Similarly, a state may not suppress evidence favorable to the accused, after a request, without violating the due process rights of the accused. *Brady* v. *Maryland*, 373 U.S. 83 (1963); *Doyle* v. *Ohio*, 426 U.S. 610, 617 (1976), holds that an accused's silence after receiving *Miranda* warnings cannot be used to impeach exculpatory trial testimony; to allow otherwise permits penalizing a defendant for exercising a right given him. In *Reece* v.

Georgia, 350 U.S. 85 (1955), this Court held that due process was violated by a rule requiring an accused to challenge the composition of a grand jury panel at a time when counsel had not been appointed and could not act. Such a rule, it was said, erected a barrier to the assertion of the constitutional right to effective counsel and, therefore, contravened due process. The general principle advanced here was aptly stated by Mr. Justice Powell in *Argersinger* v. *Hamlin*, 407 U.S. 25, 44 (1972) (concurring opinion):

> "Due Process, perhaps the most fundamental concept in our law, embodies principles of fairness rather than immutable line drawing as to every aspect of a criminal trial."

Here, if to undertake a secret interrogation without counsel violates widely accepted notions of ethics and fairness, it should be prohibited under the due process clause. And there is no doubt that such actions have meet with widespread disapproval.

For example, in *United States* v. *Springer*, 460 F.2d 1344, 1354 (7th Cir. 1972), then-Circuit Judge Stevens dissented from a panel majority which found that an interrogation of an accused, after indictment, without giving his counsel the right to be present, did not vitiate the conviction in the case at bench. Under circumstances identical to those in this case, where a jail interrogation was carried out solely for trial preparation, after the beginning of prosecution in the absence of either notice to or presence of defense counsel, and having no investigative purpose, the dissent noted, "In a civil con-

text I would consider this behavior unethical and unfair. In a criminal context I regard it as such a departure from 'procedural regularity' as to violate the due process clause of the Fifth Amendment." 460 F.2d at 1355.

In *Mathies* v. *United States*, 374 F.2d 312 (D.C. Cir. 1967), Chief Justice, then-Circuit Judge Burger, writing for the panel of Circuit Judges, discussed a "troublesome problem" arising out of the police officers having questioned an accused after indictment without notifying his counsel. The court concluded that evidence challenged later at trial was not the fruit of the questioning. But, the opinion noted that, in a civil context, such conduct would have been forbidden and, in a criminal context, it was said that *Miranda* v. *Arizona*, 384 U.S. 436 (1966), "plainly will require that such interviews can be conducted only after counsel has been given an opportunity to be present." 374 F.2d at 316, n. 3. The court said, "We assume that the episode will not arise again in the future." *Id.*, at 316. But, it is now a familiar pattern.[30]

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[30] Hurried interrogations, before a lawyer can come into the picture, are not unusual events. Indeed, court cases reflect a pattern of police conduct in which one sees repeated attempts to interrogate prisoners outside the presence of counsel. *United States* v. *Cobbs*, 481 F.2d 196 (3d Cir. 1973), *cert. denied*, 414 U.S. 980 (1973); *United States* v. *Durham*, 475 F.2d 208 (7th Cir. 1973); *United States* v. *Miller*, 432 F. Supp. 382 (E.D. N.Y. 1977), *aff'd sub nom. United States* v. *Fernandez*, 573 F.2d 1297 (2d Cir. 1978); *United States* v. *Cookston*, 379 F. Supp. 487 (W.D. Tex. 1974); *State* v. *Turner*, 32 Ore. App. 61, 573 P.2d 326 (1978) (interrogation before defendant could speak with newly appointed counsel; *Miranda* rights given and statements made, but no waiver); *State* v. *Travis*, 360 A.2d 548 (R.I. 1976).

The Ninth Circuit has found the conduct of a confrontation between agents for the prosecution and the defendant, under circumstances designed to prevent the attendance or advice of counsel, to be a violation of the Sixth Amendment. *See Schantz* v. *Eyman*, 418 F.2d 11, 13 (9th Cir. 1969). There, a confrontation occurred between the accused and a mental health expert, and was intended to elicit evidence countering an insanity defense. The Ninth Circuit has not found a Sixth or Fourteenth Amendment violation in similar encounters between interrogators and the accused, but has severely criticized such tactics. The leading Ninth Circuit case is *Coughlan* v. *United States*, 391 F.2d 371 (9th Cir. 1968), in which the *per curiam* opinion criticized the practice of interrogating an accused after the institution of prosecution, without notice to counsel. Judge Hamley wrote an extensive, widely-quoted dissent, in which he concluded that, for interrogating officers to renew a request for a statement, during a private and in-custody confrontation in the absence of counsel, when the accused had previously indicated he did not wish to talk with the interrogating officers, "flouts the spirit of the Fifth and Sixth Amendments and the rational of *Miranda.*" 391 F.2d at 374. Judge Hamley quoted the above cited portion of *Mathies* v. *United States, supra,* and also concluded that former Canon 9 had been violated by such a procedure. 391 F.2d at 375-76. In addition, the Ninth Circuit has said, in *United States* v. *Four Star,* 428 F.2d 1406 (9th Cir. 1970), that to conduct an in-custody interrogation of an accused person known to be represented by counsel without affording counsel an op-

portunity to be present is "undesirable . . . and that a prosecuting attorney who . . . takes advantage of its results violates professional ethics." 428 F.2d at 1406, 1407 (1970).

The Seventh Circuit in *United States* v. *Durham,* 475 F.2d 208 (7th Cir. 1973), excluded a confession because of the "ethical questions" and a conclusion that the government carried a burden to show that Durham's counsel was notified of the interrogation.

Reference has been made in this Court's opinions to the proposition that interrogations of an accused without giving counsel an opportunity to be present is a violation of former Canon 9 and of present DR 7-104, without deciding whether or not such conduct contravenes either Sixth or Fourteenth Amendment guarantees. *E.g., Masiah* v. *United States,* 377 U.S. 201; *United States* v. *Henry,* _____U.S. _____, n. 14 (No. 79)121, June 16, 1980). Other courts have disapproved such tactics without reaching the constitutional issue. *E.g., United States* v. *Thomas,* 474 F.2d 110 (10th Cir. 1973) ("This does not necessarily present a constitutional question, but this is an ethical and administrative one . . .", *id.*, at 112); *People* v. *Green,* 405 Mich. 273, 274 N.W.2d 448 (1979) (because defendant had instituted interview, violation of DR 7-104 "relatively innocuous" and, therefore, no due process violation, *id.*, at 455); *People* v. *Hobson,* 39 N.Y.2d 479, 348 N.E.2d 894 (1976) (prohibiting such interrogations as a matter of state constitutional law); *State* v. *Yatman,* 320 So. 2d 401 (Fla. App. 1975) ("While we condemn the pro-

cedure employed here, we conclude that it does not automatically require a dismissal", *id.*, at 403). Some courts have rejected an exclusionary effect because of a violation of the Canon of Ethics, *e.g.*, *United States* v. *Masullo*, 489 F.2d 217 (2d Cir. 1973) (defendant requested interview, court concerned that rule would be applied only to those who actually have lawyers); *State* v. *Richmond*, 114 Ariz. 186, 560 P.2d 41 (1976) (DR 7-104 applies only to civil cases, *id.*, at 191); *State* v. *Nicholson*, 77 Wash. 2d 415, 463 P.2d 633 (1969) ("The purpose of Canon 9 was to assure to civil litigants some of the protection from these influences which the Federal and State Constitutions guarantee to criminal defendants", *id.*, at 636).

It is obvious that the vast weight of opinion concludes that, for a prosecuting attorney or his agents to interrogate an accused for purposes of obtaining a confession usable in court, without advising his counsel, is unethical and improper behavior. It is just as wrong to do so before one can obtain the counsel he has asked for and will receive within hours. *McLeod* v. *Ohio*, 381 U.S. 356 (1965).[31] We do not here contend that the

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[31] In *McLeod*, the Ohio Supreme Court had concluded that *Massiah* v. *United States*, 377 U.S. 201 (1969), was inapplicabe because *McLeod* had not yet received appointed counsel. This court summarily reversed. *See also Abeles* v. *State Bar*, 108 Cal. Rptr. 359, 510 P.2d 719 (1973), indicating that DR 7-104 applies even where a party has counsel of record but not one actually authorized to act for the party. 510 P.2d at 723. And at least one state ethics opinion has expressly indicated that the prohibition to interrogate an accused in the absence of notice of counsel applies "as of the time that defendant had requested counsel, rather than as of the time that it might be said that counsel was technically appointed or

Sixth or Fourteenth Amendment ought to incorporate DR 7-104 of the Code of Professional Responsibility, either "bag and baggage" or at all. Instead, we merely cite the widespread acceptance and application of that rule, as indicative of the ethical impropriety of the one-sided secret contact that occurred in this case, which is certainly pertinent to determining whether the Arizona authorities intentionally or negligently deprived Edwards of his Sixth Amendment rights, *Michigan* v. *Tucker*, 417 U.S. 433 (1974), or whether they "consciously and knowingly set out to violate such rights", *Brewer* v. *Williams, supra*, 430 U.S. at 407 (Marshall, J., concurring). Moreover, if "due process" is a combination of notions of fundmental fairness, *Argersinger* v. *Hamlin, supra* (concurring opinion), and the principle that conviction may only result from a fair trial that is "not a sham or a pretense," *Palko* v. *Connecticut*, 302 U.S. 319, 327 (1937), then this Court can surely allow the ethical impropriety of what happened to Robert Edwards to enter into its definition of "due process".

It hardly seems novel or controversial to conclude that intentionally avoiding the presence of consel when

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retained." Opinion No. 155, 28 Oregon State Bar Bulletin, p. 10, Oct. 1967. And the Texas Bar concludes that the county attorney should give the accused an opportunity to secure counsel, and only conduct a confrontation if such an opportunity is afforded and rejected. Texas Bar Opinion 226, 18 Baylor L. Rev. 195, 307 (1966). It has also been made clear that the ethical strictures apply where a police officer is permitted by a state's attorney to conduct an interrogation or the state's asttorney uses the fruits of such an interrogation. *See Illinois Professional Ethics Opinion 320, 58 Ill. B.J. 139 (1969); Texas Bar Opinion 144, 18 Baylor L. Rev. 195, 255 (1966).*

conducting a confrontation between an accused and his interrogators solely to obtain trial testimony, justifies reversal of a conviction. As one respected commentator noted fifteen years ago, the overall concept of due process is available where the police "elicit a confession at the stationhouse from a suspect whose case is ripe for presentation to a magistrate, thus postponing the assistance of counsel". Judge Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure,* 53 Cal. L. Rev. 929, 951 (1965). And in a case later affirmed by this Court on retroactivity grounds, Judge Friendly said in dissent:

> "I continue to believe that, in the absence of overriding necessity or consent, a man who has been brought before a judge on a charge of a capital crime, and has expressed his desire for counsel, is entitled under the constitution *to be let alone until he gets one." United States ex rel. Stovall* v. *Denno,* 355 F.2d 731, 745 (2d Cir. 1966), *aff'd sub nom Stovall* v. *Denno,* 388 U.S. 293 (1967) (emphasis supplied).

The courts of the various circuits that have passed on the matter conclude *at least* that Judge Friendly was right: One prosecution has started and an accused wants a lawyer, he should be let alone until he gets one.[32] They and some states' Supreme Courts have refrained from holding as a matter of due process that this unfairness should be redressed. Inasmuch as these occurrences significantly affect the fairness of the ensuing trial, by permitting the development and presentation of evidence

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[32] *See* cases discussed *supra,* at pp. 47-50.

that is necessarily onesided and may be coerced, this Court should recognize that due process is violated by such a state of affairs, and should prohibit the introduction of a confession obtained as a result of an interrogation which has bypassed defense counsel.

IV. Even If There Could Be A Waiver After Edwards Asked To Have A Lawyer And Told The Jailor He Did Not Want To Speak With The Detectives, The Record Does Not Permit A Finding That A Waiver Occurred.

If, notwithstanding what has been said in Argument I above, *Miranda* v. *Arizona*, 384 U.S. 436 (1966), is interpreted to permit the police to reinterrogate Edwards after he has asked for a lawyer and said he did not want to talk with the detectives, the question of waiver must then be considered. Furthermore, even if a *Miranda* waiver might have occurred, an even stronger showing is required to establish that Edwards waived the right to the assistance of counsel at a critical pretrial which Argument II, above, demonstrates he was entitled to. Under both circumstances, the only event upon which a finding of waiver could be based is that, on the morning after his arrest, Edwards ultimately gave a statement when he was reinterrogated. He did not revoke his request for counsel made the evening before. He had not had a chance to consult with counsel. He told the detention officer he did not want to speak to anyone. He said he did not want a statement taped because it could be used against him in court of law. Under whatever standard is applied, these facts do not make out a waiver.

It is axiomatic that, in order to waive a Federally guaranteed constitutional right, there must be shown an understanding and intelligent relinquishment of a known right. *Tague* v. *Louisiana*, _____U.S._____ (No. 79-5386, Jan. 21, 1980).[33] The burden of proof is on the government, and it is a heavy one.[34] *Tague* v. *Louisiana, supra; Miranda* v. *Arizona*, 384 U.S. 436 (1966), and the prosecution cannot be said to have carried its burden in the case at bar.

Courts must indulge in every reasonable presumption against a finding of waiver, *North Carolina* v. *Butler*, 441 U.S. 369 (1979), and any waiver allegedly obtained subsequent to a request for counsel is constitutionally suspect when it is the result of continued interrogation, because it is that interrogation which should cease upon the assertion of the right to a lawyer.[35]

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[33] *Tague* is the latest of many cases of this Court on the subject: *North Carolina* v. *Butler*, 441 U.S. 369 (1979); *FAre* v. *Michael C.*, 442 U.S. 707 (1979); *Brewer* v. *Williams*, 430 U.S. 387 (1977); *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973; *Miranda* v. *Arizona*, 384 U.S. 436 (1966); *Brookhart* v. *Janis*, 384 U.S. 1 (1966); *Carnley* v. *Cochran*, 369 U.S. 506 (1962); *Johnson* v. *Zerbst*, 304 U.S. 458 (1938).

[34] As the importance of the right is increased, the need for a clear showing of waiver is concomitantly higher. Rights which are fundamental to the assurance of a fair trial are more important (right to counsel, for example) than rights such as those promulgated by the Fourth Amendment which do not, in and of themselves, affect the fairness of any ensuing trial. *Schneckloth* v. *Bustamonte*, 412 U.S. at 240 (applying high standard to *Miranda* waivers).

[35] The initial assertion of the right to counsel "weighs heavily against the finding that a subsequent uncounseled confession is voluntary." *United States* v. *Clark*, 499 F.2d at 807. *See, also, Commonwealth* v. *Murray*, 359 Mass. 509, 269 N.E.2d 641 (1971);

> "[T]he accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism." *Michigan* v. *Mosley,* 423 U.S. at 110, n. 2 (White, J., concurring).

See, also, People v. *Ireland,* 75 Cal. Rptr. 188, 450 P.2d 580 (1969). Edwards had asserted his right to counsel the day of his arrest. When the police sought to interview him the following morning, he endeavored to assert his right not to talk to them but was forced to do so by the jailer (J.A. 77). This continued interrogation in the face of repeated assertions by Edwards that he chose not to talk to the police weighs heavily against a finding of voluntary waiver, *United States* v. *Womack, supra; United States* v. *Hernandez, supra,*[36] as police may not be permitted to overbear a defendant's will. *North Carolina* v. *Butler, supra; Brewer* v. *Williams, supra.* According to Edwards' testimony, he finally talked to the police because he did not believe renewing his request for an attorney would be efficacious. 122 Ariz. at 217 (Gordon, J., dissenting). This demonstrates that he did not voluntarily change his mind about wanting a lawyer before he made a statement but, rather, that he

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State v. *Nash,* 407 A.2d 365 (N.H. 1979); *People* v. *Cunningham,* 49 N.Y.2d 203, 424 N.Y.S.2d 421 (1980) (uncounseled waiver following request for counsel cannot be voluntary).

[36] *See, e.g., Dyett* v. *People,* 177 Colo. 370, 494 P.2d 94 (1972); *Holmes* v. *Staste,* 300 A.2d 6 (Del. 1972); *People* v. *Grant,* 45 N.Y.2d 366, 380 N.E.2d 257 (1978); *People* v. *Byers,* 71 A.D.2d 77, 421 N.Y.S.2d 462 (1979).

simply concluded that he would not get one. And it is not at all clear that he understood that verbal statements could be used against him in court.

After being ordered to meet with the police officers the morning after his arrest, Edwards showed that he failed entirely to grasp the import of what the police were saying to him. First, he reasserted his right to silence when the jailor insisted he had to talk to the officers. Yet, being read his rights, he agreed to talk but did not want his statements recorded so that they could not be used against him. Even after the police officers explained that oral statements were admissible, regardless of whether recorded or not, Edwards exhibited obvious confusion by continuing to insist that the statements not be taped. If he had acutally understood his rights, he would not, given his continued attempts to avoid self-incrimination, have consented to make a statement. As he did not understand his rights he could not have validly waived them. *United States* v. *Clark, supra* (marked confusion as to the meaning of rights weighs heavily against a finding of valid waiver).

At the very least, Edwards' adoption of such manifestly self-contradictory positions should have alerted the police to his ultimate failure to grasp the meaning of the proffered warnings and counseled against further questioning. *See Thompson* v. *Wainwright, supra; United States* v. *Nielsen,* 392 F.2d 849 (7th Cir. 1968); Pirtle v. *State,* 263 Ind. 16, 323 N.E.2d 634 (1975). In *Nielsen,* defendant was interrogated after his arrest for the theft of a car. As in the instant case,

defendant asserted his constitutional rights to an attorney and to silence. He said he would not sign the waiver form until he had seen his attorney. The police testified at trial that defendant then said they could proceed with their questioning. The *Nielsen* fact pattern closely tracks the instant case, where Edwards refused to allow the taping of his statement but proceeded to answer questions. The *Nielsen* court recognized that the defendant's adoption of a self-contradictory position with respect to his right not to incriminate himself was evidence of a lack of comprehension such that the subsequent statements were not the product of a valid, understanding waiver of defendant's rights. The same result is warranted in the case at bar.

In *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973), this Court made it clear that, contrary to the situation involving a consent search, the government must prove that Edwards made "an intentional relinquishment or abandonment of a known right or privilege" before he can be found to have waived his right to counsel, and that this test of *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), applied to waivers of counsel in an interrogation situation, 412 U.S. at 236-239. Under circumstances in which no right to counsel has been claimed, but instead involved an accused hearing the *Miranda* warnings and deciding to make a statement, this Court held in *North Carolina* v. *Butler, supra,* that a waiver of the rights to remain silent and to have counsel, under *Miranda* v. *Arizona, supra,* need not be made expressly but could be implied from the particular facts and circumstances

surrounding the case. *North Carolina* v. *Butler* did not retreat from the high standards set in *Schneckloth* and previous cases, as is demonstrated by *Fare* v. *Michael C.*, 442 U.S. 707 (1979), in which this Court reaffirmed its statement in *Miranda* v. *Arizona,* that if an interrogation continues without the presence of an attorney and a statement is taken "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel", 384 U.S. at 475. That proposition was again reinforced by the opinion of this Court last term in *Tague* v. *Louisiana,* _____U.S. _____ (No. 79-5386, Jan. 21, 1980). None of these cases hold that a waiver of *Miranda* protections can be found on facts like those presented here. To the contrary, what is demonstrated is an attempt to support a waiver merely by virtue of the fact that a statement was obtained on the morning of January 20, 1977, while Edwards was still waiting for counsel.

As the New Hampshire Supreme Court recognized, there is a difference in the showing needed to establish, by the totality of circumstances, a voluntary waiver of "first level" *Miranda* warnings, and what is required where counsel is requested. "A voluntary oral or written express waiver (not induced by further interrogation) [should] be obtained once the right to councel is asserted." *State* v. *Nash,* 407 A.2d 365, 368, (N.H. 1979).

In order for the State of Arizona to establish that the waiver requirements of *Johnson* v. *Zerbst, supra,*

had been satisfied, it carried the very heavy burden of proving that Edwards was quite conscious of his right to counsel, and voluntarily chose to forego counsel's help. The Arizona Supreme Court, while concluding that Edwards' statements were voluntarily made, did not determine whether an effective waiver of the Sixth Amendment right to the assistance of counsel was made and, conceding for the moment that the statement itself was voluntarily made, it was clearly unaccompanied by any voluntary relinquishment of counsel's help.[37]

This Court has never found a valid waiver of the right to counsel, during a critical stage interrogation, occurring after commencement of prosecution. Under most circumstances, the issue of waiver of counsel arises in court, and a decision is reached by a judge, before the proceeding occurs for which a waiver of counsel is contemplated. This Court has imposed upon judges considering such waivers the "solemn duty . . . to make a thorough inquiry and to take all steps necessary to insure the fullest protection of this constitutional right at

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[37] The State court did inject a troublesome procedural quirk into the case when it determined, as a matter of Arizona criminal procedure, that a waiver of counsel existed. Edwards had argued that Ariz. R. Crim. P. 6.1(c), which required a waiver of right to counsel to be "in writing after the court has ascertained that he knowingly, intelligently and voluntarily desires to forego them . . .", applied to the right to counsel guaranteed "as soon as feasible after being taken into custody". Ariz. R. Crim. P. 6.1(a) (17 Ariz. Rev. Stat. Annot.). The Supreme Court agreed that the language of the Rule, on its face, required such a written waiver approved by the court, but held, on the basis of its prior cases, that no such formal waiver was required (J.A. 19-20; 122 Ariz. at 212).

every stage of the proceedings", *Von Moltke* v. *Gillies,* 332 U.S. 708, 722 (1948).

Of course, in some circumstances, the argument of waiver simply could not be made. *E.g., Massiah* v. *United States,* 377 U.S. 201 (1964); *United States* v. *Henry,* _____U.S. _____ (No. 79-121, June 16, 1980). In *Brewer* v. *Williams,* 430 U.S. 387 (1977), this Court held that no waiver of the right to counsel had been established. Williams had had several *Miranda* warnings given to him, and had conferred with counsel at least once by telephone and twice in person, before Captain Leaming gave the "Christian burial" speech, which elicited Williams' damaging admissions. The record in this case falls short of that in *Williams,* in establishing the level of comprehension by Edwards of his right to counsel, and the extent of the volition that he exercised in making the statements without waiting to consult with counsel. In addition, here, unlike *Williams,* Edwards had not yet been able to speak with counsel; he was reinterrogated by Marmion and Milne after an overnight stay in "the hole"; he was called out to the jail interview room over his objections; and although he mentioned, according to Marmion's testimony, that he did not yet have a lawyer, he apparently said nothing about giving up his prior request, or being willing to forego the advice of a lawyer. Finally, the statements that Edwards made about talking with Marmion ("I'll tell you what you want to know but I don't want it tape recorded because I don't want it used against me in a court of law," (J.A. 53)) hardly indicates a state of mind in

which Edwards had reconciled to his satisfication how the assistance of counsel would help him or hinder him in dealing with an interrogation by the detectives, and in preserving the opportunity to engage in plea bargaining.[38]

Like *Brewer* v. *Williams, supra,* this is a case "in which the police deliberately took advantage of an inherently coercive setting in the absence of counsel", *Brewer* v. *Williams*, 430 U.S. at 414, n. 2, and an affirmance or a finding of valid waiver of the right to counsel would substantially erode "the individual's effective representation by counsel". *Id.*, at 415 (Stevens, J.).

The showing necessary for a waiver of counsel has been equated to that required to show a waiver of the right to trial by jury, to confront one's accusers, or necessary to support a plea of guilty, *Boykin* v. *Alabama,* 395 U.S. 238 (1969). But there was no such waiver proven in this case.

CONCLUSION

The challenged confession arose after Edwards had been charged by criminal complaint, arrested, taken into custody and was awaiting arraignment and trial. The interrogation was not undertaken to seek additional

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[38] Edwards' tetimony at the Suppression Hearing also indicates confusion about the meaning of the word "statement". As is not surprising for a secret interrogation, the evidence of what, precisely, Edwards said and understood on that morning was not memorialized in any direct, contemporaneous record. *See* footnote 20, *supra.*

suspects or to solve the crime. The trial was "old and cold". Edwards knew when he was arrested that he needed the help of counsel, and he concluded that he would not make a statement until he had counsel's help. Whether based upon the Fifth and Sixth Amendment aspects of *Miranda* v. *Arizona,* 384 U.S. 436, or upon the Sixth and Fourteenth Amendment rights to the assistance of counsel at every critical stage leading up to the prosecution, to leave undisturbed what resulted in this case would be to stand by while "the secret trial in the police precincts effectively supplants the public trial guaranteed by the Bill of Rights". *Spano* v. *New York,* 360 U.S. 315, 326 (1959) (Douglas, J., concurring). It is, therefore, respectfully requested that the judgment of the Arizona Supreme Court be reversed and that the case be remanded for further proceedings consistent with this Court's opinion.

Respectfully submitted,

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